In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-266

BETHLEHEM STEEL CORPORATION, *Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent,*

DAVID MONTGOMERY TITUS, a minor, by his Guardian ad Litem, DENISE MARIE CUTHBERT, *Real Parties in Interest.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Bethlehem Steel Corporation, Inc., respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals made and filed July 28, 1977.

OPINION BELOW

There were no written opinions in either the District Court or the Court of Appeals. The views of the District Court were announced orally from the bench. A transcript of these views was submitted to Court of Appeals and is part of the record there.

The District Court and the Court of Appeals issued orders. These appear in the appendix hereto.

JURISDICTION

The order of the Court of Appeals was filed July 28, 1977. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1441. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1447 and 28 U.S.C. § 1651.

QUESTIONS PRESENTED

1. Whether the orders of the District Court and the Court of Appeals, Ninth Circuit, conflict with a decision of this Court.

2. Whether the rulings of the District Court and the Court of Appeals, Ninth Circuit, conflict with a ruling of the Court of Appeals, Fifth Circuit, in a similar case.

3. Whether the District Court's refusal to grant petitioner time to respond violated petitioner's right to Due Process of Law.

STATUTORY PROVISIONS INVOLVED

Jurisdiction and Venue — Actions Removable Generally — 28 U.S. § 1441 (a) — "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of

the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Procedure for Removal — 28 U.S.C. § 1446 (a) — "A defendant . . . desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him . . . to remove together with a copy of all process, pleadings and orders served upon him . . . in such action. (b) . . . If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Procedure after Removal Generally — 28 U.S.C. § 1447 (c) — "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs . . . The State court may thereupon proceed with such case. (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

STATEMENT OF THE CASE

David Montgomery Titus through his guardian ad litem, both of them being California citizens, filed in the Superior Court of the State of California for the County of Ventura a case styled "David Montgomery Titus, a minor, by his guardian ad litem, Edsel Lewis Titus, plaintiff, vs. G. E. Ramseyer, et al., defendants," numbered 54822 in the files of that court. Plaintiff named several

individual defendants who were citizens and residents of the counties of Ventura and Los Angeles, State of California, and several fictitious John Doe defendants. Some time after filing the original complaint, plaintiff amended his complaint to add as an additional defendant the petitioner, Bethlehem Steel Corporation. Well before June 28, 1977, all of the remaining fictitious John Doe defendants were dismissed. At noon on June 28, 1977, the action first became removable from the State Court to the United States District Court when Plaintiff voluntarily dismissed the last three defendants who were California residents and citizens. That left as the only remaining defendant this petitioner, a corporation incorporated in the State of Delaware and with its principal place of business in the State of Pennsylvania.

At 3:00 p.m. on June 29, 1977, approximately 27 hours after the case first became removable, the petitioner Bethlehem Steel Corporation filed a petition and bond for removal in the United States District Court for the Central District of California pursuant to and in strict compliance with the provisions of 28 U.S.C. § 1441 and § 1446. The case was there numbered 77-2407-MML. The District Court had proper jurisdiction over the action, there being no jurisdictional defects whatsoever in the removal.

Six days later, on Tuesday, July 5, 1977, at 9:00 a.m., plaintiff filed with the District Court an ex parte application for an order shortening time to have the court hear plaintiff's motion to remand at 10:00 a.m. that day. A hearing was held on the ex parte application to shorten time at 10:00 a.m. Over petitioner's objections, the order was granted. The hearing on plaintiff's motion to remand started immediately. Counsel for the petitioner then moved the court for a sufficient extension of time, probably not exceeding one or two days, in order to allow it to file opposing affidavits and points and authorities, and in order to allow it to obtain the record from the State

Court on which plaintiff's remand motion was based. The District court denied the motion but ordered the hearing recessed until 2:00 p.m. the same day. At that same time the court indicated to the parties that it had made a tentative decision to grant plaintiff's motion to remand on the ground of a "waiver" of the right to remove. Thus, petitioner was given only three hours to prepare for the hearing on plaintiff's motion to remand.

The parties went promptly before the court at 2:00 p.m. on July 5. The hearing on plaintiff's motion actually began at 2:45 p.m. At that time petitioner renewed its request that the court grant it sufficient time to prepare opposition and obtain from the State Court those portions of the record on which plaintiff's counsel based his remand motion. The United States District Court denied these requests and granted plaintiff's motion, stating that it "found a waiver in this matter." The official transcript of the hearing on the motion to remand shows that the United States District Court clearly and unambiguously remanded on the ground that the petitioner "waived" its right to removal. Nevertheless, the order granting remand as drafted by plaintiff's counsel stated that the case was remanded because it "was removed improvidently and without jurisdiction, federal jurisdiction having been waived. . . ."

On July 14, 1977, petitioner filed with the United States Court of Appeals for the Ninth Circuit a Petition for Writ of Mandamus and/or Petition for Writ of Prohibition, asking the Court of Appeals to order the District Court to exercise its jurisdiction and retain the case, and vacate its order to remand. On July 28, 1977, the United States Court of Appeals issued an order that "Upon due consideration, the temporary stay heretofore issued is vacated, the motion for stay is denied, and the petition for writ of mandamus is denied."

REASONS RELIED ON FOR ALLOWANCE OF FOR THE WRIT

1. The decisions of the District Court and of the Court of Appeals conflict with applicable decisions of this Court on federal court jurisdiction.

The holding of the District Court that the right to exercise Federal jurisdiction through the removal statute had been "waived", and the Court of Appeals' approval of that holding, conflict with applicable decisions of this court.

The decision below conflicts with this Court's decision in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92 (1898): "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental. The want of it will be taken notice of by the court on its own motion, and *can not be waived by either party.*" *Id.* at 98. [Emphasis added]. The holdings below that jurisdictional facts are subject to "waiver" conflicts with nearly two hundred years of Federal judicial policy.

The decision below also conflicts with this court's recent decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). There, the court held that the *only* basis for remand of a diversity case to the State Court from which it was removed is that set down in 28 U.S.C. Section 1447(c):

> "The case was removed improvidently and without jurisdiction..."

"Waiver" is not a basis for remand. The only permitted basis for remand is that the case was removed improvidently because there is no jurisdiction. Here, there would be no jurisdiction *only* if there was no diversity of citizenship, less than $10,000 was at issue or the thirty (30) day removal time limit imposed by the statute had expired.

The respondent District Court and the Real Party in Interest conceded that there was jurisdiction in the United States District Court. There was no argument that there was no diversity of citizenship. There was no argument that less than $10,000 was in controversy. There was no argument that the case was removed after the statutory time limit. The only argument was that Federal jurisdiction had been "waived." This argument, and the orders of the courts below based on it, conflict with the decisions of this Court discussed above.

2. The holding of the District Court and the approval of that holding by the Court of Appeals, placed the Ninth Circuit in conflict with the Fifth Circuit. The holding of the United States District Court for the Central District of California and the approval of that holding by the United States Court of Appeals for the Ninth Circuit, conflicts with the holding of the United States Court of Appeals for the Fifth Circuit in *In Re Southwestern Bell Telephone Co.*, 535 F.2d 859 (5th Cir. 1976). The Fifth Circuit held that the District Court could not use the similar doctrine of "judicial estoppel" as the basis for holding that a case was removed "improvidently and without jurisdiction" within the meaning of 28 U.S.C. § 1447 (c). Unlike the Ninth Circuit, the Fifth Circuit followed this Court's decision in *Thermtron* and issued a writ of mandamus directing the District Court to vacate its remand order. In discussing the doctrine of "judicial estoppel" the Fifth Circuit stated that:

> "Whatever the scope of the doctrine may be so far as we have been able to discover, it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. Persons who meet those criteria have a statutory, and indeed a constitutional, right to resort to the Federal Courts. A District Court has no authority to negate

the right simply because such a person has not observed the consistency in pleading that the forum state may demand. Judicial estoppel principles cannot conclusively establish jurisdictional facts." *Id.* at 861.

3. The District Court's refusal to grant petitioner sufficient time to prepare a response and to obtain a transcript of the State Court proceedings which plaintiff claimed constituted the waiver violated the petitioner's right to Due Process of Law.

At 9:00 a.m. on Tuesday, July 5, 1977 counsel for petitioner received a telephone notice from the Clerk of the District Court that at 10:00 a.m. the court would hold a hearing on an ex parte motion by plaintiff to have the time in which to make his remand motion shortened. At 10:00 a.m. counsel for petitioner appeared in the District Court and was then for the first time served with copies of the ex parte motion for an order shortening time and with the remand motion. Although counsel for petitioner objected that he needed time in which to make a response and obtain the necessary affidavits and transcripts with which to meet plaintiff's motion, the objection was overruled and a hearing on the remand motion set for 2:00 p.m. that same day. The hearing on the motion to remand went ahead at 2:00 p.m. that day over renewed objections by petitioner's counsel that a hearing on such short notice effectively prevented him from presenting a response. The objections were overruled and the motion to remand granted.

As this Court has held, "a fundamental of due process is 'the opportunity to be heard.'" *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). This "is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The hearing on the motion was not at a meaningful time nor in a meaningful manner.

The actions of the District Court, and the Court of Appeals' approval of those actions, conflict with this court's many decisions on due process. A hearing on only three hours notice is not held at a meaningful time. A hearing without petitioner being able to present opposition is not one held in a meaningful manner.

CONCLUSION

The right of an unsympathetic out-of-state defendant to remove a case from the State Court to a Federal Court is clear, unambiguous and valuable. It is one which must jealously be guarded and protected by the Federal Courts. *Home Insurance Co. v. Morse,* 20 Wall 445, 22 L.Ed. 365 (1874); *Muller v. Lykes Coast Line,* 144 F.Supp. 135 (S.D. Texas 1940); *Gentle v. Lamb-Weston, Inc.,* 302 F.Supp. 161 (N.D. Fla. 1969). The actions of the District Court and the Court of Appeals violate the clear and unambiguous provisions of 28 U.S.C. § 1441 and § 1447, conflict with this Court's holding in *Thermtron,* and conflict with the Fifth Circuit's holding in *Southwestern Bell.* The decisions of the District Court and the Court of Appeals violate petitioner's constitutional and statutory rights to have this case heard by a Federal Court.

The decision of the District Court and the Court of Appeals' approval of that decision creates a manifest injustice and inequity, violates the Constitutional and Statutory rights of the petitioner, refuses to recognize federal jurisdiction, and violates petitioner's right of due process. A writ of certiorari should issue to review the order of the Ninth Circuit herein.

Respectfully submitted,
MICHAEL D. DEMPSEY

By

MICHAEL D. DEMPSEY
Attorney for Petitioner
Bethlehem Steel Corporation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID MONTGOMERY TITUS, a minor, by his Guardian ad Litem, EDSEL LOUIS TITUS, *Plaintiff*, *vs.* G. E. RAMSEYER, et al., *Defendants.*	No. 77 2409 MML ORDER GRANTING REMAND

The motion of DAVID MONTGOMERY TITUS, plaintiff, for an order to remand the above-entitled action to the Superior Court of the State of California for the County of Ventura, came on regularly for hearing on July 5, 1977, upon an Ex Parte Application for an Order Shortening Time, and this Court setting the motion for hearing on the same date. Gregory S. McDougall, of ARCHBALD & SPRAY, appeared as counsel for plaintiff and Michael D. Dempsey, of LILLICK, McHOSE & CHARLES, appeared as counsel for defendant, BETHLEHEM STEEL CORPORATION. This Court having considered affidavits in support of the motion, and having heard the argument of counsel, and being fully advised, and it appearing to this Court that the case was improperly removed to this Court in that the case was removed improvidently and without jurisdiction, federal jurisdiction having been waived by defendant, BETHLEHEM STEEL CORPORATION.

IT IS HEREBY ORDERED that the plaintiff's motion be and the same is hereby granted, and that this case be remanded to the Superior Court of the State of Califor-

nia for the County of Ventura; and that a certified copy of this order be mailed by the Clerk of this Court to the Clerk of the Superior Court of the State of California for the County of Ventura;

IT IS FURTHER ORDERED that plaintiff have and recover his costs and disbursements in this Court against defendant, to be taxed by the Clerk.

DATED: January 7, 1977

/s/ LUCAS
United States District Judge

Disapproved as to Form: Objections coming per local rules.

LILLICK, McHOSE & CHARLES

By: _____
Michael D. Dempsey

Prepared by ARCHBALD & SPRAY

By: GREGORY S. McDOUGALL
Gregory S. McDougall

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETHLEHEM STEEL CORPORATION, *Petitioner,* vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent,* DAVID MONTGOMERY TITUS, a minor, by his Guardian ad Litem, DENISE MARIE CUTHBERT, *Real Parties in Interest.*	No. 77-2559 ORDER

Upon due consideration, the temporary stay heretofore issued is vacated, the motion for stay is denied, and the petition for writ of mandamus is denied.

/s/ ELY
Circuit Judge

/s/ GOODWIN
Circuit Judge

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Ernest J. Cook, being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 South Maple Avenue, Los Angeles, California 90015.

That on August 15, 1977 affiant served copies of the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon the below by:

Air Courier:

Supreme Court of the United States
First & East Capitol Streets
Washington, D. C. — 40 copies & original

Air Courier:

United States Solicitor General
Department of Justice
Washington, D. C. — 3 copies

Hand Delivery:

The Honorable Malcolm M. Lucas
Judge, United States District Court
312 North Spring Street
Los Angeles, California 90012 — 1 copy

United States Mail:

Gregory S. McDougall, Esq.
Archbald & Spray
3888 State Street
Santa Barbara, California 93105 — 3 copies

Subscribed and Sworn to before me
this 15th Day of August, 1977

Rita Korney

Notary Public in and for the
State of California

OFFICIAL SEAL
RITA KORNEY
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires December 7, 1980